Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-436

DUPONT CIRCLE CITIZENS ASSOCIATION,

*Petitioner,*

*v.*

DISTRICT OF COLUMBIA ZONING COMMISSION

and

NELLO PICCA,

and

CLAUDE L. BENNER, JR.
Trustees for Eurania Associates
(Intervenors of right before the District
of Columbia Court of Appeals)

*Respondents.*

## BRIEF OF RESPONDENTS NELLO PICCA and CLAUDE L. BENNER, JR., TRUSTEES FOR EURANIA ASSOCIATES, (INTERVENORS OF RIGHT BELOW) IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals below is reported as *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, 355 A.2d 550 (1976.) The opinion of the District of

Columbia Court of Appeals decided September 24, 1976 in a related case concerning further processing of the subject Planned Unit Development (PUD) before the District of Columbia Board of Zoning Adjustment appears in the Appendix hereto. (Appendix A). In that case, known as *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, Dupont Circle Joint Venture, Nello Picca and Claude L. Benner, Jr., Trustees for Eurania Associates, Intervenors*, No. 10070 (District of Columbia Court of Appeals, September 24, 1976) the District of Columbia Court of Appeals affirmed the decision of the District of Columbia Board of Zoning Adjustment granting further processing of the subject PUD. Petitioner has referred to this case in its various applications for extensions of time in which to file its Petition for Writ of Certiorari.

## QUESTIONS PRESENTED

I. Whether Petitioner has raised any Federal Question which entitles it to a review by this Court of the Decision of the District of Columbia Court of Appeals on a local zoning issue.

II. Whether Petitioner is entitled to:

A. A reassessment by this Court of the evidence of record already heard, reviewed and passed upon by the District of Columbia Zoning Commission, an expert zoning administrative body, whose decision was affirmed by the District of Columbia Court of Appeals, the highest local court of the District of Columbia.

B. A review by this Court of the interpretation of a local District of Columbia statute by the District of Columbia Court of Appeals which is fully supported by that court's opinion, and for a party who can claim no direct injury as a result of that interpretation.



C. A consideration by this Court of the natural and logical consequence of the decision of Petitioner's counsel to withdraw from a public hearing in an administrative proceeding as a deprivation of procedural due process by the District of Columbia Zoning Commission.

## COUNTER-STATEMENT OF THE CASE

This case involves preliminary and final applications for approval of a Planned Unit Development (PUD) under Article 75 of the Zoning Regulations of the District of Columbia. The subject property consists of a triangular piece of land of over 66,000 square feet located in Northwest Washington and bounded by Dupont Circle on the North, 19th Street on the East, Sunderland Place on the South and New Hampshire Avenue on the West. The property includes three improvements – the Euram Building on Dupont Circle, the Christian Heurich Memorial Mansion at the corner of New Hampshire Avenue and Sunderland Place, and the Sunderland Building at the corner of Sunderland Place and 19th Street – and a parking lot in the middle of the property to be improved by a new 12 story office building with retail uses on the first floor and part of the first basement. The PUD included a zoning change from the SP District (limited office, apartment and parking uses) to the C-3-B District (major business and employment center) for a portion of the property, the remainder of the property already being located in the C-3-B District.

Section 7501.1 of the Zoning Regulations of the District of Columbia (hereinafter, "Zoning Regulations") describes the purposes of a PUD as follows:

> 7501.1. *Purposes of Planned Unit Development.* The purpose of this section is to encourage, in the various zoning *districts* in keeping with the intent

and purpose of each district, the development of well-planned residential, institutional and commercial developments, industrial parks, urban renewal projects or a combination thereof, which will offer a variety of building types with more attractive and efficient overall planning and design without sacrificing creative and imaginative planning.

The procedures and standards established herein are intended to permit, with Zoning Commission approval, diversification in the use, size, type, and location of *buildings* and *structures*, and to improve circulation and site facilities while at the same time insuring adequate standards relating to public health, safety, welfare and convenience in the use and occupancy of *buildings*, *structures*, and other facilities in planned building groups consistent with the spirit, intent and purpose of the Zoning Regulations.

> While providing for flexibility in design, a *planned unit development* should not be used to circumvent the intent and purpose of the general provisions of the Zoning Regulations. Increases in *building height* and density are permitted as an incentive to allow flexibility of development; however, such increases should not be granted when (a) a [sic] conflict with the development plans and policies of the District of Columbia; (b) they do not enhance the neighborhood; or (c) they do not provide future occupants of *planned unit developments* with a living and/or working environment and amenities superior to those which can be achieved by applying the general provisions of the Zoning Regulations. (Italicized words are in original, indicating terms defined in the Zoning Regulations.)

The PUD process before the District of Columbia Zoning Commission involves two public hearings, one on the preliminary application and one on the final application. Zoning Regulations, §§7501.37 and 7501.391. After the first public hearing, the Zoning Commission either rejects or gives preliminary approval to the PUD. If it approves the PUD then it sets forth the appropriate zoning classification for the PUD and states in detail the elements and guidelines which shall be followed by the developer in his final application. Zoning Regulations §7501.38.



In the final application, the Zoning Commission considers the PUD in more specific detail, in the context of the elements and guidelines set forth in its preliminary approval. The Zoning Commission reviews such items as the height, bulk, lot coverage and location of buildings, the location and number of off-street parking spaces and loading berths, existing and/or proposed public and private rights-of-way and easements, and the types and locations of uses. Zoning Regulations §7501.39. In accordance with the purposes of the PUD process, the Zoning Commission attempts to achieve overall planning and design advantages with the voluntary cooperation of property owners. The benefits which the Zoning Commission achieved through the present PUD include the following:

> A new commercial retail development which would support and serve the Dupont Circle subway station by providing retail commercial uses at the ground level and first basement and pedestrian arcades facilitating access to the subway station.
>
> Development of a free-standing building through setbacks which would preserve the accessibility of light and air to the existing improvements on the site and would afford greater light and air to the occupants of the new office retail building.
>
> Assistance to the Columbia Historical Society in the preservation of the Christian Heurich Memorial

Mansion by permitting it to sell and transfer a portion of its development rights to the property in the middle of the site, thereby furthering the ends of historic preservation while at the same time maintaining the density of development for the entire site within the limits of the allowed density in the C-3-B District.

Elimination of an unattractive and environmentally undesireable open parking lot.

The proceedings before the Zoning Commission were quasi-judicial, with trial type hearings conducted on the record and cross-examination permitted. *Capitol Hill Restoration Society v. D.C. Zoning Commission,* 287 A.2d 101 (D.C. App. 1972) the Zoning Commission received testimony from the following governmental agencies and individuals in support of the application at the public hearings on both the preliminary and final applications:

–The District of Columbia Zoning Staff;

–The Zoning Advisory Council (D.C. Code (1973) Section 5-417 – abolished by the District of Columbia Self Government Governmental Reorganization Act, Section 492(b) Pub. L. 93-198, Title IV §492(b) );

–The National Capital Planning Commission;

–The Joint Committee on Landmarks of the National Capitol;

–The National Trust for Historic Preservation;

–The Applicant property owners, who submitted testimony from the following:

A representative of the applicant as property owner;

The attorney for the Columbia Historical Society;

The Treasurer for the Columbia Historical Society;



Owners of the Sunderland Building and Euram Building;

The architect of the proposed new office building;

A land planning consultant who qualified as an expert witness;

A traffic consultant who qualified as an expert witness.

The Dupont Circle Citizens Association, Petitioner herein, was represented by counsel before the Zoning Commission throughout the proceedings and at all of the public hearings. The Dupont Circle Citizens Association submitted no expert testimony but confined its presentation to statements of counsel and testimony from one or two of its members.

The Zoning Commission considered the superior design features, the public amenities, the support for the subway system and the furtherance of the goals of historic preservation which would be accomplished by the approval of this PUD, and it decided that the PUD should be approved. The District of Columbia Court of Appeals affirmed the Zoning Commission's decision, stating in part:

"We have examined the record and conclude that there was substantial evidence to support the decision of the Commission. The Commission is the authority charged by Congress with interpreting and enforcing the Zoning Laws and Regulations of the District of Columbia. As long as its proceedings were according to law, its decision will carry a presumption of regularity on appeal and this court will not weigh the evidence and substitute its judgment for that of the Commission.[13]

"Finding the other contentions of petitioner to be without merit, the orders appealed from are affirmed.

[13] *Brawner Building, Inc. v. Shehyn*, 134 U.S.App.D.C. 125, 130, 442 F.2d 847, 852 (1971); *Salyer v. McLaughlin*, 100 U.S.App.D.C. 29, 31, 240 F.2d 891, 893 (1957); *Lewis v. District of Columbia*, 89 U.S.App.D.C. 72, 74, 190 F.2d 25, 27, (1951); 3 R. Anderson, American Law of Zoning §21.16 (1968)."

*Dupont Circle Citizens Association v. D.C. Zoning Commission*, 355 A.2d 550, 560-61 (D.C. App. 1976).

In accordance with the provisions of the Zoning Regulations of the District of Columbia, the property owners submitted the PUD to the District of Columbia Board of Zoning Adjustment for further processing in two stages. Zoning Regulations §7501.4. The Board of Zoning Adjustment granted further processing and the District of Columbia Court of Appeals affirmed the decisions of the Board Zoning Adjustment in *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, D.C. App. No. 10070 (September 24, 1976), contained herein as Appendix A.

## REASONS FOR DENYING THE WRIT

### I.

**PETITIONER IS MERELY SEEKING TO HAVE THIS COURT REASSESS THE EVIDENCE OF RECORD WHICH WAS HEARD, REVIEWED AND PASSED UPON BY THE DISTRICT OF COLUMBIA ZONING COMMISSION, AN EXPERT ZONING ADMINISTRATIVE BODY, WHOSE DECISION WAS AFFIRMED BY THE DISTRICT OF COLUMBIA COURT OF APFEALS, THE HIGHEST LOCAL COURT OF THE DISTRICT OF COLUMBIA.**

Petitioner has argued that the decision of the District of Columbia Zoning Commission to grant the subject Planned Unit Development (PUD) was based solely on its



desire to achieve the objective of historic preservation, that there was no evidence whatsoever before the Zoning Commission that the transfer of development rights involved in this PUD was "necessary" to achieve historic preservation, that the Zoning Commission's findings on historic preservation are therefore "totally devoid of evidentiary support" and that as a consequence Petitioner has been denied due process of law. All of the above arguments are without basis.

The District of Columbia Zoning Commission did not base its decision wholly, or even primarily, upon a desire to achieve historic preservation by permitting the sale and transfer of development rights from the Christian Heurich Memorial Mansion property to the adjacent property to be developed with a new office-retail building. Rather, as the District of Columbia Court of Appeals recognized, the Zoning Commission only ". . . gave *consideration* to historical preservation in weighing the transfer and sale of development rights and the merits of the P.U.D." *Dupont Circle Citizens Association v. D.C. Zoning Commission*, 355 A.2d 550, 558 (D.C. App. 1976). (Emphasis added.)

The record before the Zoning Commission was not devoid of evidence which would support a finding that the transfer of development rights was necessary in order to raise the funds required to preserve the Christian Heurich Mansion. A plain reading of the Zoning Commission's Order, Appendix C to the Petition for Writ of Certiorari, (as well as a reading of the Petition for Writ of Certiorari itself), reveals that there was sufficient evidence in the record of this case for the Zoning Commission to make such a finding. Petitioner disputed that evidence, but it never offered any evidence to the contrary. Petitioner is now asking this Court to reassess the evidence and to substitute its judgment for the

judgment of the Zoning Commission and of the District of Columbia Court of Appeals. This Court has stated many times, however, that it will not grant a Writ of Certiorari merely to reassess the evidence of record. See *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951); *General Talking Pictures Corporation v. Western Electric Co.*, 304 U.S. 125 (1938).

Petitioner is obviously attempting to arrogate to itself in these administrative zoning proceedings the rights of a defendant in a criminal case. The cases which it has cited, such as *Garner v. Louisiana*, 368 U.S. 157 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960), are criminal cases involving situations where the record before the trial court was not simply deficient, but actually had no evidence whatsoever to support the result reached. In the present case, to the contrary, there is ample evidence in the record to support the decision of the Zoning Commission affirmed by the District of Columbia Court of Appeals. Even assuming *arguendo* that there is no evidence whatsoever on the issue of historic preservation which would support the findings of the Zoning Commission, nonetheless the achievement of historic preservation was not the sole basis for the grant of the PUD. Therefore, eliminating the historic preservation basis does not diminish the other evidence of record and could not change the result.

This case involves nothing more than a zoning decision which must be measured by the controlling decisions of this Court in *Euclid v. Ambler Realty, Co.*, 272 U.S. 365 (1926); *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Eastlake v. Forest City Enterprises, Inc.*, U.S. , 49 L.Ed.2d 132 (1976); and *Young v. American Mini Theatres*, U.S. , 49 L.Ed.2d 310 (1976).



In *Euclid v. Ambler Realty Co., supra*, this Court had before it for the first time a complex zoning ordinance regulating height, density and use of property. The Court stated the controlling zoning principle that

> "... it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 395. (Citations omitted).

The Court upheld the comprehensive zoning ordinance on the basis that it was a legitimate effort to cope with the complex land use conditions of that time, and that its provisions did not pass beyond the bounds of reason. 272 U.S. 387, 389.

In *Zahn v. Board of Public Works*, 274 U.S. 325 (1927), this Court reaffirmed the *Euclid* case and further stated that even where it is fairly debatable whether a determination was "an unreasonable, arbitrary or unequal exercise of power," "this court . . . will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." 272 U.S. at 328.

More recently in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), this Court stated through Justice Douglas:

> "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clear air make the area a sanctuary for people." 416 U.S. at 9.

Thus, zoning bodies may not only use the police power to prevent adverse conditions but in addition they may use it to promote beneficial conditions. This is particularly applicable to the present case, where the District of

Columbia Zoning Commission sought to achieve a range of public amenities and benefits with the cooperation of property owners, which through an exercise of its legislative discretion it found to be desirable.

In another recent decision, *Eastlake v. Forest City Enterprises, Inc.*, U.S. 49 L.Ed.2d 132, 139 (1976), this Court reaffirmed the principle stated in *Euclid v. Ambler Realty Co., supra.*

Most recently, in *Young v. American Mini Theatres,* U.S. 49 L.Ed.2d 310 (1976), this Court reviewed a Detroit zoning ordinance regulating the location of adult movie theaters. The Court found that the ordinance was not unconstitutional, and it stated the principle,

> "The record discloses a factual basis for the Common Council's conclusion that this kind of restriction will have the desired effect. [Footnote omitted]. It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed the reasonable opportunity to experiment with solutions to admittedly serious problems." U.S. , 49 L.Ed.2d at 326-27.

The above decisions of this Court in zoning cases, and not the decisions involving the rights of defendants in criminal cases, are the measure by which this Petition for Writ of Certiorari must be judged. This Court should not put itself in the position of revaluating the evidence of record on which an expert zoning body has made its decision, affirmed by the highest local court of the jurisdiction. The Petition for Writ of Certiorari and Brief in Opposition reveal that the action of the Zoning Commission was not "clearly arbitrary and unreasonable,



having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty, Co.*, 272 U.S. at 395. At the very minimum, it was "fairly debatable." *Zahn v. Board of Public Works, supra.*

The good faith efforts of the Zoning Commission to deal with the complex modern problems of regulating land use should be accorded high respect, and the Zoning Commission should be afforded the opportunity to experiment with positive solutions to these problems. *Young v. American Mini Theatres, supra.* Here, the Zoning Commission has acted for sound reasons, on the basis of substantial evidence, and with the voluntary cooperation of property owners, to achieve desirable land use objectives. This Court should continue to refuse to substitute its judgment for that of local zoning administrative bodies.

## II.

**THE DISTRICT OF COLUMBIA COURT OF APPEALS' INTERPRETATION OF THE UNIFORMITY PROVISIONS OF THE DISTRICT OF COLUMBIA ZONING ACT, D.C. CODE (1973 ed.) §5-413, IS LOGICAL AND FULLY SUPPORTED BY ITS REASONING, AND IN ANY EVENT PETITIONER CAN CLAIM NO DIRECT INJURY AS A CONSEQUENCE OF THIS INTERPRETATION.**

The District of Columbia Court of Appeals reviewed and rejected Petitioner's challenge under the uniformity provisions of the District of Columbia Zoning Act, D.C. Code 1973 §5-413, at *Dupont Circle Citizens Association, supra,* 355 A.2d at 558-59. The court considered decisions from Pennsylvania and California and the treatise of Anderson, *American Law of Zoning,* in interpreting this matter of first impression in the District of Columbia. It reached its decision on the basis of an

interpretation of the clear, unambiguous statutory language. The court stated, citing Anderson, *supra,* that the Zoning Act

> ". . . requires that only the regulations be applied uniformly to all property throughout a district, all owners of the same class being treated alike. The uniformity provision does not prohibit a classification which is reasonable." 355 A.2d at 559.[1]

The District of Columbia Court of Appeals properly did not involve itself in the legislative question whether PUD's, including the transfer of development rights, were a good or a bad zoning device. It simply interpreted the Zoning Act as written. Petitioner's attempt to raise constitutional implications from the Court's interpretation is groundless. This Court has often expressed its great reluctance to review a determination of a question of local law by the District of Columbia courts. It has stated,

> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. District of Columbia v. Pace, 320 U.S. 698, 702, 88 L.Ed. 408, 410, 64 S.Ct. 406; Busby v. Electric Utilities Employees Union, 323 U.S. 72, 74, 75, 89 L.Ed 78, 79, 80, 65 S.Ct. 142." *Fisher v. United States,* 328 U.S. 463, 476 (1946). See also *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

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[1] On the basis of the case law before it, the Court clearly rejected the opinions cited by Petitioner in Williams, *American Land Planning Law.* Petition for Writ of Certiorari at 14-15. There is no sound basis for interpreting the PUD regulations as contrary to the Zoning Act, and so the District of Columbia Court of Appeals acted correctly.



The District of Columbia Zoning Act is not a part of a national legislative scheme such as the statute in *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143 (1946) which was a part of the nationwide legislative scheme for unemployment compensation induced by the Social Security Act of 1935. This interpretation of the District of Columbia Zoning Act does not acquire the stature of a Federal Question simply because the Act is based upon a standard statute which has been used elsewhere in the country. It is a decision involving a local District of Columbia statute and thus, a case where the Supreme Court would ordinarily not grant a Petition for a Writ of Certiorari.

Furthermore, even assuming *arguendo* that the court's interpretation of the uniformity provisions does give rise to a Federal Question, nonetheless Petitioner is not the proper party to raise that question. Petitioner has challenged the uniformity provisions from the point of view of an "owner of a single ordinary sized lot, acting alone." Petition for Writ of Certiorari at 15. Petitioner has stated

> "Thus, by its nature as well as by its explicit language, the D.C. PUD Ordinance 'encourage[s]' large scale 'development' and disfavors smaller property owners. This creates an invidious discrimination based on wealth, offensive to the equal protection and due process clauses." Petition for Writ of Certiorari at 16. (Footnotes omitted).

The record does not disclose that Petitioner or any of its members is the owner of a single ordinary sized lot seeking approval of a PUD under the Zoning Regulations of the District of Columbia. They are not. This Court has recently stated in *Warth v. Seldon,* 422 U.S. 490 (1975),

". . . a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." (Footnotes omitted). 422 U.S. at 508.

* * *

"Even in the absence of injury to itself, an association may have standing solely as a representative of its members. [Citations omitted]. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. [Citations omitted]. The association must allege that its members or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." 422 U.S. at 511. See also *Costillo v. McConnico,* 168 U.S. 674 (1898).

Since neither Petitioner nor any of its members are seeking approval of a PUD, they have not placed before this Court a specific, immediate, concrete injury which constitutes a justiciable case that this Court may hear. Consequently, the challenge to the Zoning Ordinance must fail on that basis as well.[2]

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[2]The District of Columbia Court of Appeals found Petitioner's challenge to Article 75 of the Zoning Regulations on the basis that it creates an invidious discrimination based on wealth, "essentially to be a frivolous argument." 355 A.2d at 560. This Court has stricken classifications based on wealth where fundamental rights such as voting rights or the rights of criminal defendants are involved. See *Luben v. Panish,* 415 U.S. 709, 719 (1974). (Concurring opinion of Justice Douglas). This Court has never held that the right to a change in zoning classification (or to oppose a change in zoning classification) is a fundamental right, and in fact it has strongly suggested the contrary in *Eastlake v. Forest City Enterprises, Inc.,* U S. 49 L.Ed.2d 132 (1976).



## III.

## THE DISTRICT OF COLUMBIA ZONING COMMISSION DID NOT DEPRIVE PETITIONER OF NOTICE OR OF AN OPPORTUNITY TO BE HEARD.

Petitioner's argument that it was deprived of notice and of an opportunity to be heard before the District of Columbia Zoning Commission is wholly without merit and is yet another effort to have this Court reassess the facts decided by the Zoning Commission and reviewed by the District of Columbia Court of Appeals. Petitioner contends (1) that it should have been served with a copy of the final application for approval of PUD filed by Respondents and (2) that its counsel's withdrawal from the public hearing before the Zoning Commission was an uninformed act, attributable to the fault of the Zoning Commission, which deprived Petitioner of the opportunity to submit proposed findings of fact and conclusions of law.

Petitioner does not argue that all of the required forms of notice were not given – publication at least once in two daily newspapers, mailing to owners of property within two hundred (200) feet of the subject property, posting of notice in the office of the Zoning Commission, and posting of the subject property. Rules of Practice and Procedure before the Zoning Commission of the District of Columbia §2.43. The Zoning Regulations of the District of Columbia, as indicated previously, provide for two public hearings on an application for a PUD, and Petitioner does not argue that it was unaware of this requirement and therefore that a second public hearing would be held after approval of the preliminary application. Zoning Regulations, §7501.38. See *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment,*

D.C. App. No. 10070 (September 24, 1974) Slip Op. at 4, Appendix A at 4a.

Petitioner argues only that the final application papers should have been served upon Petitioner's counsel, though Petitioner did not become an official party to the proceedings before the Zoning Commission on the final application until September 26, 1974. See Appendix B hereto, Petitioner's September 26, 1974 letter to the Zoning Commission contained in the Record of *Dupont Circle Citizens Association v. D.C. Zoning Commission, supra* on the final application at 80. Petitioner concludes that since it was not so served, the final application papers constitute an *ex parte* communication to the Zoning Commission, even though they were filed in the Zoning Commission's office on August 15, 1974 and were a matter of public record from that time on. The public hearing was held on October 2, 1974 nearly seven weeks later. *Dupont Circle Citizens Association supra,* 355 A.2d at 555, Note 4. Furthermore, Petitioner's letter of September 26, 1974 reflects that Petitioner had actual notice of the public hearing and entered an appearance as a party on September 26, 1974. In that letter Petitioner itself incorporated the record on the preliminary application for approval of the PUD as setting forth the grounds for its opposition.

Not only did Petitioner have notice of the time and place of the hearing on the final application, but additionally, as the opinion of the District of Columbia Court of Appeals makes clear, a plain reading of the Zoning Regulations would have given Petitioner notice of the scope of that hearing, if Petitioner did not already



know what that scope would be. *Dupont Circle Citizens Association, supra,* 355 A.2d at 553-55.[3] Therefore, Petitioner's argument that the Zoning Commission should have attempted to persuade its counsel not to withdraw voluntarily from the public hearing on October 2, 1974 is equally without merit. Petitioner's counsel knew or should have known of the scope of the hearing on the final application. He, himself, incorporated the record on the preliminary application into the proceedings on the final application. Appendix B. The Zoning Commission correctly determined, and the District of Columbia Court of Appeals affirmed its decision, that the Zoning Commission could not advise counsel how to proceed with his case. 355 A.2d at 554.

Petitioner's failure to learn of the opportunity to submit proposed findings of fact and conclusions of law was ". . . simply the natural and logical consequence of its counsel voluntarily declining to participate" in the public hearing. 355 A.2d at 555. The Zoning Commission requested that counsel file proposed findings of fact and conclusions of law at the October 2, 1974 public hearing, when its Chairman stated

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[3] Regarding Petitioner's actual notice of the hearing before the D.C. Board of Zoning Adjustment for further processing of Stage I of the PUD, the D.C. Court of Appeals stated, quoting *Clark v. Wolman,* 243 Md. 597, 221 A.2d 687, 688 (1966),

> "The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification purposed to inform may be replaced by actual knowledge. 1 Merrill, Notice, 480. And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects. Ibid.; *Cassidy v. Baltimore County Board of Appeals,* 218 Md. 418, 146 A.2d 896; 2 Merrill, Notice, 384, 444. [Emphasis in original]." *Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment,* D.C. App. No. 10070 September 24, 1976 Slip Op. at 5, Appendix A at 5a.

> ". . . I will say for the record that counsel in this case will kindly submit proposed findings of fact and conclusions of law within one week after the closing of the record, which is two weeks from the adjournment of this hearing." Transcript of October 2, 1974 Zoning Commission hearing at 72.

Thus the Zoning Commission did not deprive Petitioner of the opportunity to submit proposed findings of fact and conclusions of law. The above quoted statement of the Chairman of the Zoning Commission at the public hearing indicates that the record of the case remained open for two weeks after the close of the hearing, and that counsel in the case had one week after the close of the record in which to submit proposed findings of fact and conclusions of law. Petitioner voluntarily withdrew from participating in the hearings, and furthermore Petitioner's failure during the three weeks after the close of the hearing to determine the status of the case and whether an opportunity to submit findings of fact and conclusions of law existed, constituted a waiver of any rights.

Since Petitioner voluntarily relinquished this right, the situation in *Herring v. New York*, 422 U.S. 853 (1975) could not arise, even assuming, *arguendo*, that Petitioner had the same rights in this zoning case as a defendant in a criminal case. However, this Court has never interpreted the Sixth Amendment's guaranty of assistance of counsel as Petitioner now wishes it to do.[4] In any event, since the record of proceedings remained open for two weeks Petitioner could have submitted any written argument or other materials it wished. The members of Petitioner

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[4]Petitioner has not cited the Sixth Amendment as one of the Constitutional provisions involved in this case.



present at the public hearing on October 2, 1974, surely must have informed Petitioner's counsel of the scope of the hearing, that the at the record would remain open for two weeks and that proposed findings and conclusions could be submitted within three weeks. *Dupont Circle Citizens Association, supra,* 355 A.2d at 555.

The District of Columbia Court of Appeals correctly recognized that there is no requirement in the Rules of Practice and Procedure before the Zoning Commission of the District of Columbia that copies of proposed findings of fact and conclusions of law be served upon other parties. There is no reason for such a requirement since these Rules do not allow any response by parties or other persons to proposed findings of fact and conclusions of law which are filed. Furthermore, such proposed findings of fact and conclusions of law become a part of the public record of the case and therefore are available for inspection by anyone. Additionally, this is not a case where the Zoning Commission adopted as its own findings the proposed findings of fact and conclusions of law submitted by a party. Rather, it wrote its own findings of fact and conclusions of law. *Cf. Matter of Telemart Enterprises, Inc.,* 524 F.2d 761, 766 (9th Cir.), *cert. denied* 44 U.S. Law Week 3531 (March 22, 1976).

## CONCLUSION

Respondents suggest that Petitioner has failed to present any substantial Federal Question which would warrant this Court's granting the Petition for Writ of Certiorari. Petitioner seeks only to have this Court reassess the evidence of record, and to reinterpret a local District of Columbia statute already interpreted correctly by the District of Columbia Court of Appeals merely because the results reached are not favorable to it. Petitioner's arguments on notice and opportunity to be heard are without substance.

For the foregoing reasons, the Petition for Writ of Certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

WILKES & ARTIS

By _____
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_____
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*Counsel for Respondents, Nello Picca and Claude L. Benner, Jr., Trustees for Eurania Associates.*

# APPENDIX

# DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10070

DUPONT CIRCLE CITIZENS ASSOCIATION, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

DUPONT CIRCLE JOINT VENTURE, NELLO PICCA and CLAUDE L. BENNER, JR., Trustees for Eurania Associates, INTERVENORS.

Petition for Review of Orders of the District of Columbia Board of Zoning Adjustment

(Argued May 11, 1976 Decided September 24, 1976)

*George F. Bason, Jr.*, for petitioner.

*Leo N. Gorman*, Assistant Corporation Counsel, with whom *John R. Risher, Jr.*, Corporation Counsel, *Louis P. Robbins*, Principal Assistant Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for respondent.

*Norman M. Glasgow*, with whom *Whayne S. Quin* and *John F. McCabe, Jr.*, were on the brief, for intervenors.

Before KELLY, YEAGLEY and MACK, *Associate Judges*.

YEAGLEY, *Associate Judge*: This is a petition for review of two orders of the District of Columbia Board of Zoning Adjustment authorizing further processing of



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a planned unit development (P.U.D.). The P.U.D. was originally authorized by the D.C. Zoning Commission by Zoning Commission Order No. 81, dated February 1, 1974, granting approval of the preliminary application, and by Zoning Commission Order No. 101, dated December 12, 1974, granting approval of the final application. Petitioner sought review of each of the foregoing orders in this court. They were affirmed by our order of January 19, 1976, which was followed by a written opinion. *See Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, D.C.App., 355 A.2d 550 (1976).

Based upon the approval of the Zoning Commission, two owners of the property in the P.U.D. applied for further processing before the Board of Zoning Adjustment pursuant to § 7501.4 of the Zoning Regulations. Both applications met the approval of respondent District of Columbia Board of Zoning Adjustment, and petitioner, Dupont Circle Citizens Association appealed. We affirm.

The relevant details relating to this planned unit development and the proceedings before the Zoning Commission are set out in full in our previous opinion and need not be restated here. *See* 355 A.2d at 552-53. Suffice it to say that the Commission's order constituted a detailed approval of the application. In its order the Commission said:

> The final approval of this preliminary application for a planned unit development is in accordance with the Zoning Regulations of the District of Columbia, as amended, and the Zoning Act (Act of June 20, 1938, 52 Stat. 797), as amended.

It added that it "ORDERS APPROVAL of said final application for a planned unit development and related





zone change, subject to the elements, conditions, and guidelines hereinafter set forth" (emphasis in original). After specifying sixteen conditions and guidelines the order ended:

> The applicants shall submit the stages and schedule of development with the application for further processing before the Board of Zoning Adjustment.

This court found no error in the proceedings before the Zoning Commission.

I.

The application of Arthur H. Keyes, Jr., to the B.Z.A. for further processing under article 75 of the Zoning Regulations sought permission to make additions and modifications to the first floor and mezzanine levels of the Sunderland Building in implementation of guideline 2 of the order of the Commission. In that guideline the Commission provided "that certain minor modifications may be made to the Sunderland Building, as shown on Exhibit 7 A, B, C & D of the public hearing." The Board of Zoning Adjustment held a public hearing on April 16, 1975, and issued an order approving the development proposals, finding them to be consistent with the plans and guidelines as approved by the Zoning Commission. With regard to the Sunderland case, petitioner asserts only one allegation of error: that the Board failed to give adequate notice of the hearing. Hence it is necessary to determine whether the various notices given by the Board complied with the statute.

Pursuant to 22 DCRR § 3.32, the Board gave notice in the following ways: (1) by publication in *The Washington Star*, a daily newspaper of the District of Columbia (§ 3.321), (2) by mailing notice to the applicant and to the owners of all property abutting the property in-

volved in the application (§ 3.322), (3) by mailing notice to the "occupants" of property situated within 200 feet of the property (§ 3.323), (4) by posting notice in the office of the B.Z.A. (§ 3.324), and (5) by posting notice on the property itself (§ 3.33). Petitioner alleges that the third type of notice listed above is not adequate where, as was done here, the notice was merely stamped "Occupant" and mailed to each particular address on a list supplied by the applicant.

We find this type of notice to be troublesome since a question exists whether it could reasonably be presumed to reach the persons sought to be reached. However, we need not decide that issue in this case. Such notices technically were as required by regulation 3.323, and we are provided no evidence that any such "occupant" was prejudiced or complained of a lack of notice. Since the petitioner had *actual* notice of the hearing, as we find *infra*, it cannot now be heard to complain of such a hypothetical deficiency.

First of all, petitioner knew that there would be a hearing before the Board of Zoning Adjustment since paragraph 17 of Commission Order No. 101 provided: "The applicants shall submit the stages and schedule of development with the application for further processing before the Board of Zoning Adjustment."

The Board of Zoning Adjustment keeps a mailing list of interested individuals and organizations who are sent notices of all Board hearings, including the hearing under consideration, in the form of an advance copy of the monthly public hearing calendar. Petitioner, Dupont Circle Citizens Association, is on that mailing list and at oral argument admitted that it received the particular calendar involved.





In addition, a representative of petitioner was present at the opening session. At the beginning of the meeting when the Board inquired into the status of the petitions for review of the Zoning Commission orders granting the P.U.D., Mrs. Catherine McCarron sought to be heard by the Board. After a brief exchange the following dialogue transpired:

> CHAIRMAN SCRIVENER: . . . Do you, as the representative of the Dupont Circle Citizens Association, the plaintiff in the D.C. Court of Appeals case, object to the hearing of this case this afternoon?
>
> MRS. McCAREN [*sic*]: Yes.
>
> CHAIRMAN SCRIVENER: Why?
>
> MRS. McCAREN [*sic*]: We say this, we are not taking part in a case or in a hearing today that involves a case for zoning which we claim is illegal.

We conclude that petitioner had actual notice of the hearing and cannot now complain of any asserted defect in notice. As the Maryland Court of Appeals has noted in *Clark v. Wolman*, 221 A.2d 687, 688 (Md. 1966):

> The law, in its majesty, is not designed to require futile action or idle gestures. It is well settled that notification *purposed to inform* may be replaced by actual knowledge. 1 Merrill, Notice, 480. And this is especially so when the knowledge has been acted upon without reliance upon the notification's absence or its defects. Ibid.; Cassidy v. Baltimore County Board of Appeals, 218 Md. 418, 146 A.2d 896; 2 Merrill, Notice, 384, 444. [Emphasis in original.]

II.

We turn now to a consideration of B.Z.A. Application No. 11901, the application by intervenors for further

processing of the planned construction of the new office building in the P.U.D. Petitioner alleges several grounds for error which it says require reversal, each of which, we reject.

The first of these relates to the D.C. Conflict of Interest Statute, D.C. Code 1975 Supp., § 1-1181. Petitioner asserts that this statute required the disclosure of the names of the applicant-intervenor's partners and financial backers and that the Board should have demanded that these persons be disclosed. We do not agree.

There is no provision in the Conflict of Interest and Disclosure Act that either authorizes or requires the Board of Zoning Adjustment to compel the disclosure of the partners or the financial backers of parties before it. The entire thrust of the statute is directed at the individual governmental official and the onus is on him to decide whether the action he is to take "would affect directly or indirectly his financial interests or those of a member of his household . . . ." D.C. Code 1975 Supp., § 1-1181(g). The Code provision presumes that the official knows the nature and extent of his and his family's financial interests.

We note that petitioner has not alleged any conflict of interest on the part of any of the Board members. Indeed, there is not even a hint of any impropriety.

III.

Petitioner also alleges that the Board's failure to grant its motion to open to the public the executive meeting at which the final decision was made was error requiring reversal. Petitioner grounds this allegation on two statutory provisions. One is the relatively new Sunshine Act, D.C. Code 1975 Supp., § 1-1503(a), which provides *inter alia*:







> All meetings (including hearings) of any department, agency, board or commission of the District Government, . . . at which official action of any kind is taken shall be open to the public. No resolution, rule, act, regulation or other official action shall be effective unless taken, made, or enacted at such meeting.

We note preliminarily that the decision made here in executive session was a quasi-judicial action in which, historically, only the voting members play a role. The quasi-judicial function of an administrative agency differs completely from the nature of its other activities. The personal and property rights of the parties, at issue in such proceedings, can only be protected, under the American system, in a judicial atmosphere that assures freedom of expression to each deciding official and encourages a free discussion and exchange of views which is so essential to frank and impartial deliberation.

This court recently interpreted the Sunshine Act in *Jordan v. District of Columbia*, D.C.App., —— A.2d —— (No. 9444, August 3, 1976). We held there that to open all meetings to the public

> would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision—thus putting them on an entirely different footing from appellate courts and juries—to say nothing of federal administrative agencies—where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results. [Slip op. at 7.]

The *Jordan* decision is controlling as to the application of the Sunshine Act.

The other provision, relied on by petitioner, is D.C. Code 1973, § 5-420 which provides that "[a]ll meetings of the board [of Zoning Adjustment] shall be open to the public." While at first blush this section might seem to compel the result sought by petitioner, upon consideration of the statutory language it appears that such a result was not intended.

The Maryland Court of Appeals in *Sullivan v. Northwest Garage & Storage Co.*, 165 A.2d 881 (Md. 1960), dealt with virtually identical statutory language and approved decisions made at executive sessions of the Board of Municipal and Zoning Appeals held after the hearing concluded. The court held that the statute required public meetings in adversary proceedings, but not for deliberations of the zoning board when a decision is to be reached. The court saw differences between the term "meetings" which the statute commands are to be public and other proceedings which need not be, and observed:

> [The statute] directs the Board to keep minutes of its "proceedings," which gives the impression that the Board is to function outside of a meeting or hearing, particularly since there is the further language that the Board shall keep records of its "examinations" and "other official actions." All of these things, the mintues, the records of the examinations and the records of other official actions are stated to be public records. [165 A.2d at 883.]

These sections of the Maryland Code are quite similar to our own Code (*see* D.C. Code 1973, § 5-420). The Maryland court went on to say that "[t]he weight of such authority as there is supports our conclusion that the hearings of the Board must be public but that the deliberations of the Board after the hearing is completed may be private." (165 A.2d at 884, citations omitted.)







We find the decision of the Maryland court to be persuasive and consistent with our holding in *Jordan v. District of Columbia, supra*, and we adopt its reasoning for the District of Columbia. Accordingly, we conclude that neither of the aforementioned Code provisions requires that the conference at which the Board considers and decides a case to be public. To hold otherwise would permit outside pressures to substantially affect Board decisions and in view of our traditional concepts of due process would raise a question as to the constitutionality of such a provision.

## IV.

Petitioner also questions the propriety of one Board member voting by proxy in favor of the application for the P.U.D. The executive session to decide this case was called by a quorum of the full five-member Board, three members then being present. (Messrs. Harps and McIntosh and Ms. Cummings.) The minutes of the Board show that Chairman Scrivener was absent from the meeting but had "cast his proxies for cases heard on June 18, 1975." The following notation appears in the minutes of the session regarding the vote of the members who heard the case:

> On motion made, duly seconded and carried by a vote 3-1-0 (Mr. Klauber not voting, not having heard the case, Lilla Burt Cummings, Esq., dissenting . . .) to GRANT the above application.

Petitioner asserts that nothing in the D.C. Zoning Act nor in any regulation or rule of the B.Z.A. permits proxy voting and hence Chairman Scrivener's vote was not valid and should not be counted. Accordingly, petitioner argues that the approval is illegal and requires reversal. This contention is based on language in D.C. Code 1973,

§ 5-420 which requires that a clear majority of the Board must approve the application.

Chairman Scrivener had been present at the hearings and heard all of the testimony. He did not designate someone else to vote for him rather he cast his vote in absentia and the Board accepted it. It appears that the Board has recognized the validity of such method of voting for many years. There is no prohibition against voting by proxy in the Code or in the regulations of the Board, and actions of the Board must be accorded a presumption of regularity. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.06 (1958). The Circuit Court has said that when administrative officials purport to decide weighty issues within their domain there is a "strong presumption of regularity [which] supports the inference that . . . they have conscientiously considered the issues . . . ." *Braniff Airways, Inc. v. C.A.B.*, 126 U.S. App.D.C. 399, 406, 379 F.2d 453, 460 (1967). D.C. Code 1973, § 5-420 provides *inter alia* that "[t]he concurring vote of not less than a full majority of the members of the board shall be necessary for any decision or order." In the instant case a quorum was present as required and the action of the Board in casting and counting votes of its members was not contrary to the law or the regulations of the Board.

Regarding the practical aspects of the operational problems of such a board, Professor Anderson observed:

> As members of the board of adjustment receive little, if any, compensation, they are not in any sense full-time employees of the municipality. Rather, they are citizens who earn their livings at various tasks, and who take time on certain days to render a public service. Their occasional absence is predictable, and some pro-





> cedural concessions have practical justification. [3 R. ANDERSON, AMERICAN LAW OF ZONING § 16.46 (1968) (footnote omitted).]

V.

Petitioner's final allegation of error is that the Board improperly confined the scope of its public hearing, and thus it was unjustifiably presented from presenting exhibits and testimony in opposition to the P.U.D. In addition it asserts that it was not permitted to adequately cross-examine the witnesses put on by the applicant and by the government and hence it was denied due process of law and rights under the D.C. Administrative Procedure Act. D.C. Code 1973, § 1-1509(b).[1]

An examination of the Zoning Regulations, however, does not lend support to petitioner's claim. Regulation § 7501.4 provides for further processing of a planned unit development after it has been approved by the Zoning Commission. The Board's consideration is limited to the matters which are mentioned in that section. It may not go back and reconsider the merits of the case as ruled upon by the Zoning Commission nor may it modify the plans except in certain limited ways.

The applicants submitted plans to the Board based upon the Zoning Commission's order and virtually identical to those approved by the Commission. The applicants purposely attempted to avoid changes in order to accelerate the decision-making process.

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[1] D.C. Code 1973, § 1-1509(b) provides *inter alia*:

> Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .

The Zoning Division of the Municipal Planning Office, in its report to the Board as to its approval of the application observed: "It is the responsibility of the Board under Paragraph 7501.43 'to implement the planned unit development as finally approved by the Zoning Commission.'" The report also stated:

> This application requests approval for one section of a PUD. Paragraph 7501.42 provides that a PUD may be submitted for further processing to the Board in one or more sections. The plans as submitted by the applicant have been compared to the plans cited in Condition No. 14 of Order No. 101 and to the other conditions contained in that Order. The plans are identical to those submitted to the Zoning Commission except that dimensions have been added to some of the drawings. The proposed building, however, fails to meet two conditions of Order No. 101, as follows:
>
> 1. The plans include 160 parking spaces. With a gross floor area of 301,434 square feet, at a rate of one parking space for each 2,000 square feet of gross floor area (Condition No. 8), only 151 parking spaces should be provided.
> 2. The plans show a penthouse on the roof extending 17 feet above the level of the roof, with an elevator override extending five feet beyond that. Condition No. 6 limits the height of *any* room structure to 17 feet above the level of the roof.
>
> The plans as submitted conform to all the other requirements of Order No. 101.

We conclude that this assessment of the nature and extent of the issues facing the Board is correct. All





other matters had been resolved by the order of the Zoning Commission. The Board properly limited the scope of its hearing to those matters as provided in § 7501.4 *et seq.* of the Zoning Regulations. Though petitioner attempted to reopen many of the issues decided by the Zoning Commission, it was properly prevented from doing so by the Board.

Petitioner asserts, however, that § 7501.47 of the Zoning Regulations[2] requires the Board to make its own specific findings on each of the matters upon which the Zoning Commission had previously ruled in its final approval order. We do not agree. Section 7501.47 must be read in the context of the other provisions in § 7501.4 *et seq.*, defining the scope of its review. It does not demand findings as to *each* requirement of § 7501.39 but only findings "related to" the matters listed in that section. It is a limitation on the scope of review and not a grant of authority.

The Board's findings were all germaine to one or more of the provisions of that section. The Board found in Finding No. 11 that the applicant had "complied with the requirements of Section 7501.39 of the regulations." In Finding No. 7 the Board found that it was merely implementing the Zoning Commission order "with no amendments", and in No. 8 it found the plan to be "in harmony with the objectives of Section 7501 . . . ." In light of the narrow issues to be decided by the B.Z.A. we find no error in the rulings of the

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[2] D.C. Zoning Regs. § 7501.47 provides: "Before approval of the final development plan, the Board shall make findings related to the requirements of paragraph 7501.39." Section 7501.39 requires that the final application for the P.U.D. before the Zoning Commission include nine enumerated items about the specifications of the P.U.D.

Board limiting the scope of petitioner's evidence. We conclude also that the findings were sufficient to meet the requirements of § 7501.47.

Petitioner alleges, however, that a "radical change in circumstances" had occurred between the time of Zoning Commission Order No. 101 and the Board's public hearing thus necessitating the complete reopening of the case.[3] We do not find that the proffer of petitioner in this regard supported its position.

Finding no other allegations of error warranting discussion,[4] the orders appealed from are

*Affirmed.*

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[3] According to petitioner this "radical change in circumstances" included: (1) "the elected D.C. City Council now has significant responsibility over 'a comprehensive, consistent and coordinated [zoning] plan for the National Capital' "; (2) "two new rezoning decisions by the Zoning Commission itself . . . which are totally at variance with and irreconsilable [*sic*] with this PUD application;" (3) "a new comprehensive planning study by the City's official Planning Office which also is totally at variance with and irreconcilable with this P.U.D. application;" (4) "a new study by the D.C. Department of Environmental Service which shows pollution already at hazardous levels at the site of this proposed PUD;" and (5) "testimony before the Board in another case by the applicant's own traffic expert which is totally contradictory to his earlier testimony . . . ."

[4] In its brief petitioner also incorporated "by reference all the points heretofore raised" in the prior cases before this court (Nos. 8237 and 9159). Petitioner does not say what it wishes us to do with these incorporated "points"; but it makes little difference since the court's resolution of issues raised in that case are, of course, the law of the case on any of the same matters raised here. The arguments which petitioner raises to the contrary in its shotgun approach to this case are specious.





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The Zoning Commission
The District Building
14th & E Streets, N.W.
Washington, D.C.

September 26, 1974

Re: Case No. 74-10/71-30F
*Dupont Circle Joint Venture*

Gentlemen:

Pursuant to Section 2.44 of the Rules of Practice, this is to advise that the Dupont Circle Citizens Assoc. hereby enters its appearance as a party in the above-identified case.

This office will represent the Assoc., which will appear as an Opponent of the Application.

The manner in which the Assoc. and its members may be affected by action on the Application and the grounds for Opposition are fully set forth in (a) brief for Petitioner *Dupont Circle Citizens Assoc. v. The Zoning Commission* case no. 8237, filed in the District of Columbia Court of Appeals on August 30, 1974, and (b) in the record below of the hearings on the preliminary application conducted on April 25 and June 21, 1973.

Among other possible witnesses who are known to counsel at this time who may testify at the hearing are Ms. Catherine McCarron, Mr. Philip Brown, Ms. Harriet Hubbard, and Ms. Loytle Gracely. This list is not ex-

clusive and other witnesses may testify at the hearing scheduled for October 2, 1974.

Very truly yours,

_____

Nicholas A. Addams

cc: Loytle Gracely, President
DCCA